

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

CARLOS BAYON,

Defendant.

Case # 18-CR-163-FPG-JJM

DECISION AND ORDER

INTRODUCTION

On August 9, 2018, Defendant Carlos Bayon was charged in a four-count indictment with two counts of retaliating against a federal official in violation of 18 U.S.C. § 115(a)(1), and two counts of threat by interstate communication in violation of 18 U.S.C. § 875(c). The indictment alleges that, on June 30, 2018, Defendant made two telephone calls in which he threatened two United States Congressmen and their families. ECF No. 8.

On February 6, 2019, Defendant filed a motion to dismiss the indictment.¹ ECF No. 45. On March 28, 2019, Magistrate Judge Jeremiah J. McCarthy issued a Report and Recommendation (“R&R”) recommending denial of the motion to dismiss. ECF No. 61. At a hearing before Judge McCarthy on April 24, 2019, Defendant indicated that he would not be filing any objections to the R&R and wished to proceed to trial immediately. ECF No. 68. Judge McCarthy therefore deemed the deadline to file objections to the R&R to have expired as of that date. *See* ECF No. 69. For the reasons stated below, the Court ADOPTS Judge McCarthy’s R&R in its entirety.

LEGAL STANDARD

In reviewing an R&R, this Court “may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1)(C). When the parties do not file objections, the Court may accept and adopt the R&R in its entirety without

¹ The motion to dismiss was part of an omnibus motion requesting various forms of relief. All requests for relief besides dismissal have been resolved. *See* ECF Nos. 55, 60. Additionally, the motion was filed through counsel. Defendant has since elected to proceed *pro se*. ECF Nos. 68, 69.

further judicial review. *Thomas v. Arn*, 474 U.S. 140, 150 (1985) (“It does not appear that Congress intended to require district court review of a magistrate’s factual or legal conclusions, under a *de novo* or any other standard, when neither party objects to those findings.”). However, the Court may review the R&R for clear error. Under this standard, the Court may “adopt those sections of [a magistrate judge’s] report to which no specific objection is made, so long as those sections are not facially erroneous.” *Batista v. Walker*, No. 94 CIV. 2826 (SS), 1995 WL 453299, at *1 (S.D.N.Y. July 31, 1995).

The Court has therefore reviewed Judge McCarthy’s R&R for clear error.

DISCUSSION

In his motion to dismiss, Defendant argues that the statutes he allegedly violated, 18 U.S.C. §§ 115(a)(1) and 875(c), unconstitutionally infringed upon his First Amendment right to free speech. ECF No. 45 at 3. He acknowledges that the First Amendment does not protect “true threats,” but argues that the calls he made were not specific enough to constitute true threats or to target the Congressmen and/or their families. *Id.* at 3-4. Thus, he argues, his phone calls constituted protected free speech. *Id.*

The Court finds no clear error in Judge McCarthy’s conclusion that these issues should be determined at trial and not via a motion to dismiss. *See United States v. Jordan*, No. 16-CR-93-FPG-HKS-1, 2017 WL 4784317, at *2 (W.D.N.Y. Oct. 24, 2017) (“The law of the Second Circuit is clear: a jury, not the Court, should determine whether an alleged threat is a ‘true threat.’”).

CONCLUSION

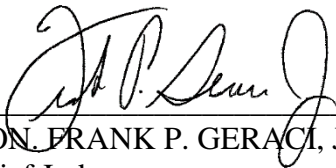
Accordingly, the Court accepts and adopts Judge McCarthy’s R&R (ECF No. 61) in its entirety. Defendant’s motion to dismiss (ECF No. 45) is DENIED.

The Court notes that the Government has two motions to set a trial date pending (ECF Nos. 23, 71), and that Defendant has expressed a desire to proceed to trial immediately. *See* ECF No.

68. The Court will hold a status conference on June 20, 2019, at 2:00pm, at which time trial will be scheduled.

IT IS SO ORDERED.

Dated: May 9, 2019
Rochester, New York



HON. FRANK P. GERACI, JR.
Chief Judge
United States District Court